IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

WEDNESDAY, THE 11TH APRIL 2007 / 21ST CHAITHRA 1929

ITA.No. 111 of 2001

AGAINST THE ORDER DATED 28.2.2001 . IN
ITA.134 & 135 (COCH) /1997 of I.T.A.TRIBUNAL,COCHIN BENCH
.....

APPELLANT:

M/S. HOTEL AND ALLIED TRADES (P) LTD., REGISTERED OFFICE, CASINO HOTEL, WILLINGDON ISLAND, COCHIN-682 003, REPRESENTED BY ITS MANAGING DIRECTOR, SHRI JOSE DOMINIC, AGED 51 YEARS, SON OF SHRI DOMINIC JOSEPH.

BY ADV. SRI.K.VINOD CHANDRAN &
LISY DEVASSY.

RESPONDENT:

THE DEPUTY COMMISSIONER OF INCOME-TAX (ASSESSMENT), SPECIAL RANGE-I, ERNAKULAM.

BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT
SRI.GEORGE K. GEORGE, SC FOR IT

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 19.12.2006, THE COURT ON 11.4.2007 DELIVERED THE FOLLOWING:

C.N. RAMACHANDRAN NAIR &
K. M. JOSEPH, JJ.

I.T.A. NO.111 OF 2001

Dated this the 11th April, 2007.

JUDGMENT

K. M. Joseph, J.

Appellant Company is running the business of a hotelier. It has two hotels - one is at Wellington Island, Cochin under the name "Casino Hotel" and the other at Lakshadweep, known as "Bangaram Island Resort". By Annexures A & A1 in the Appeal, assessments were finalised for the years 1992 - 93 and 1993 - 94 allowing deductions under Section 80 HHD in terms of the claim of the appellant, that is by treating both hotels as separate units and by determining benefits separately. However, the Commissioner of Income Tax took up the assessments for scrutiny and after noticing that computation of deduction under Section 88HHD was erroneous and prejudicial to the interest of Revenue, initiated proceedings under Section 263 of the Income Tax Act. After hearing the appellant, the

Commissioner set aside the assessments and directed computation of benefits under Section 80 HHD for the business of the assessee as a whole vide Annexures B and B1 to the Appeal. The Income Tax Appellate Tribunal confirmed the orders of the Commissioner. It is against the said order that this Appeal is filed. The only issue that arises for consideration is whether in the facts and circumstances of the case, the profits for the purpose of Section 80 HHD are to be computed in respect of each of the hotel units which had separately obtained approval of the Department of Tourism on two different dates or whether the eligible deduction under Section 80HHD has to be computed with reference to the profits of the entire business of the assessee as held by the Tribunal. Section 80HHD in so far as it relevant is extracted hereunder:

> ***"S. 80HHD - Deduction in respect of earnings in convertible foreign exchange -*** *(1) Where an assessee, being an Indian company or a person (other than a company) resident in*

India, is engaged in the business of a hotel or of a tour operator, approved by the prescribed authority in this behalf or of a travel agent, there shall, in accordance with and subject to the provisions of this Section, be allowed, in computing the total income of the assessee, a deduction of a sum equal to the aggregate of -

(a) fifty per cent of the profits derived by him from services provided to foreign tourists; and

(b) so much of the amount out of the remaining profits referred to in clause (a) as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised for the purposes of the business of the assessee in the manner laid down in sub-section (4);

(3) For the purposes of sub-section (1), profits derived from services provided to foreign tourists shall be the amount which bears to the profits of the business (as computed under the head "Profits and gains of business or

profession) the same proportion as the receipts specified in sub-section (2) (as reduced by any payment, referred to in sub-section (2A), made by the assessee bear to the total receipts of the business carried on by the assessee.

(7) Where a deduction under sub-section (1) is claimed and allowed in respect of profits derived from the business of a hotel, such part of profits shall not qualify to that extent for deduction for any assessment year under any other provisions of this Chapter under the heading "C-Deductions in respect of certain incomes", and shall in no case exceed the profits and gains of such hotel."

2. For the assessment year 1992 - 1993, the appellant had filed a return claiming a loss of Rs.3,85,507/=. Finally the Assessing Officer arrived at a gross total income after providing for certain additions at Rs.67,22,646/=. The deduction under Section 80HHD was separately calculated. For Casino Hotel, it was Rs.3,69,982/= and in respect of Bangaram Island Resort it

was calculated at Rs.53,14,494/=. Thus, after deducting the said amounts, the total income was arrived at Rs.10,38,170/=. But, it was, however, restricted to the gross total income at Rs.55,59,401/=. For the year 1993 - 1994, likewise, the appellant was found entitled to deduction at Rs.5,18,797/=. Even though the deduction claimed by the appellant was Rs.37,28,956/=, the amount was restricted to the gross total income. The Commissioner found that the words used in the Statute is very clear, namely profits of business. It is to be arrived at taking the business as a whole and not unit-wise. It is this finding which was accepted by the Tribunal.

3. We heard Shri S. Sarangan, learned senior counsel appearing on behalf of the appellant and Shri P.K.R. Menon, learned standing counsel appearing for the respondent. Learned counsel appearing for the appellant would contend that the stand taken in Annexures B and C orders is unsustainable. He would submit that the view taken is not in keeping with the principles enunciated by the Apex Court. Reference is made to the

following decisions by counsel.

1) Commissioner of Income-Tax v. Buildwell Assam (P) Ltd. ((1996) 220 ITR 577).

2) Commissioner of Income-Tax v. Siddaganga Oil Extractions Pvt. Ltd. ((1993) 201 ITR 968).

3) Bajaj Tempo Ltd. v. Commissioner of Income-Tax ((1992) 196 ITR 188).

4) Commissioner of Income-Tax v. Kamani Engineering Corporation Ltd. ((1986) 161 ITR 473).

5) Commissioner of Income-Tax (Central) Madras v. Canara Workshops P. Ltd. ((1986) 161 ITR 320).

6) State Level Committee And Another v. Morgardshammar India Ltd. ((1996) 101 STC 1).

In Bajaj Tempo Ltd. v. Commissioner of Income-Tax ((1992) 196 ITR 188), the question which fell for consideration was whether the assessee was entitled to claim partial exemption from payment of tax under Section 15C of the Indian Income Tax Act, 1922. Briefly put, the facts were as follows:

Bajaj Tempo Ltd. was formed for exploiting manufacturing licence issued by the Government in favour of

M/s.Bachhraj Trading Corporation (hereinafter referred to as the Corporation). M/s. Bajaj Temp Ltd. entered into an agreement with the Corporation to take over the rights under the licence to manufacture tempo vehicles and to take over the factory registered under the name of Auto Rickshaw Engineering Factory as a going concern with its assets, liabilities, machinery, etc. The agreement further provided that the Company shall be put in possession of the premises of the factory and the buildings on payment of monthly rent as a lessee. Tools and equipments valued at Rs.3,500/= belonging to the Corporation were also transferred to the Company. The benefit under Section 15C which was a partial relief from tax in a sum not exceeding six per cent of capital employed was denied relying on the provision which provided that the benefit would not be available in a case where the new industrial undertaking is formed by transfer to the new business of building, machinery and plant previously used in any other business. The Apex Court found that the initial exercise should be to find out whether the undertaking was a new

one. After finding that it was indeed a new one, the Court proceed to find that the restriction of denial of benefit arises not by transfer of building or material to the new Company, but only when the Company is formed by such transfer. It was found that it is not every transfer of building or material, but it is the transfer which should have resulted in the formation of the undertaking which will result in denial of the benefit. The Court, inter alia, held as follows:

> *"A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it."*

In fact, learned senior counsel placed considerable reliance on the same. As regards the transfer of machinery was concerned, the Court took note of the fact that the value was an amount of Rs.3,500/=. The Court also found that, technically speaking, it is transfer of material used in previous business.

4. In Commissioner of Income-Tax, (Central) Madras v. Canara Workshops P. Ltd. ((1986) 161 ITR 320), the question arose as to whether in computing the profits for the purpose of deduction under Section 80E of the Income Tax Act, 1961, the loss incurred by the assessee in the manufacture of alloy steels should not be set off against the profits from the manufacture of automobile or ancillaries. The assessee was manufacturing automobile spares. Products manufactured by the Company were covered by the list to the Vth Schedule to the Income Tax Act. During the previous year in question, the assessee commenced manufacture of alloy steels which was also included in the Vth Schedule and sustained the loss. There were profits disclosed from the automobile ancillary unit. Assessee claimed relief at eight per cent under Section 80E on the profits from the automobile unit. The question which arose was whether the stand of the Department that the relief under Section 80E was to be given on the profits from the automobile unit, after setting off the loss in the alloy steel unit. Section 80E provided for

deduction from the profits and gains in an amount equal to eight per cent attributable, inter alia, to the manufacture or production of any articles specified in the list in the Vth Schedule. The Court found that the assessee carries on two industries, both of which are under the Vth Schedule. The Court held as follows:

> *"It seems to us that the object in enacting Section 80E is properly served only by confining the application of the provisions of that Section to the profits and gains of a single industry. The deduction of eight per cent is intended to be an index of recognition, that a priority industry has been set up and is functioning efficiently. It was never intended that the merit earned by such industry should be lost or diminished because of a loss suffered by some other industry. It makes no difference that the other industry is also a priority industry. The co-existence of two industries in common ownership was not intended by Parliament to result in the misfortune of one being visited on the other. The legislative intention was to give to the meritorious its full*

reward. To construe Section 80E to mean that you must determine the net result of all the priority industries and then apply the benefit of the deduction to the figure so obtained will be, in our opinion, to undermine the object of the Section. An example will illustrate this. An industry entitled to the benefit of Section 80E could have its profits wholly wiped out on adjustment against a heavy loss suffered by another industry, and, thus, be totally denied the relief which should have been its due by virtue of its profits. In our opinion, each industry must be considered on its own working only when adjudging its title to the deduction under Section 80E. It cannot be allowed to suffer because it keeps company with some other industry in the hands of the assessee. To determine the benefit under Section 80E on the basis of the net result of all the industries owned by the assessee would be, moreover, to shift the focus from the industry to the assessee. We hold that in the application of Section 80E, the profits and gains earned by an industry mentioned in that Section cannot be reduced by the loss suffered by any other industry

or industries owned by the assessee."

5. In the decision of the Bombay High Court in Commissioner of Income Tax v. Kamani Engineering Corporation Ltd. ((1986) 161 ITR 473), the assessee had a licence for manufacture of transmission towers in excess of its actual capacity in its Bombay factory. It applied to the Government of India to shift a part of its capacity to the State of Rajasthan. Sanction was accorded and it located the plant in Rajasthan in a new building and acquired new plant and machinery. The assessee claimed the benefit of Section 80J. In computing the capital of the new unit, a question arose whether the loans and current liabilities should be deducted and whether the deduction of borrowed moneys and debts due should be made only in respect of the liabilities of the unit at Jaipur. The Court proceeded to hold, inter alia, that the shifting of a part of the capacity would not make any difference where new plant and machinery was set up in a new building constructed for the purpose. It was also found that there is not a word to show that

there was, in fact, unity of control. The finding of the Tribunal was that there was no shifting of machinery or plant already in existence or splitting up or re-construction of the business alrady in existence. The Court held as follows:

> *"There is not a word to show that there was, in fact, unity of control. The shifting of a part of the capacity would seem to us to make no difference where, as here, new plant and machinery was set up in a new building constructed for the purpose. We see no merit whatever in the Revenue's contention."*

In State Level Committee v. Morgardshammar India Ltd. ((1996) 101 STC 1), the Apex Court was dealing with the U.P.Sales Tax Act. Exemption was refused under the Act to the appellant on the ground that machinery worth nearly Rs.4,59,575/= used in the Unit was purchased from another person who had actually purchased it for his own use. The Committee had taken the view that the machinery was not new and it is not entitled to get the

exemption. The Court held as follows:

> *"It appears to us the true rule of construction of a provision as to exemption is the one stated by this Court in Union of India v. Wood Papers Ltd. (1991) 83 STC 251; (1990) 4 SCC 256; 1990 SCC (Tax) 422; (STC page 255; SCC page 260, para4).....Truly, speaking, liberal and strict construction of an exempton provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause, then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject faaalls in the notification then full play should be given to it and it calls for a wider and liberal construction.....A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals (1991) 83 STC 234 and other decisions, viz. Each such*

exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave, Assistant Collector of Central Excise and Customs (1969) 2 SCR 253; AIR 1970 SC 755 that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e. by the plain terms of the exemption.....The principle is well-settled that when two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment. But in this connection, it is well to remember the observations of the Judicial Committee in Carolin M. Armytage v. Frederick Wilkinson (1878) 3 AC 355 (PC) at page 370 that it is only, however, in the event of there being a real difficulty in ascertaining the

meaning of a particular enactment that the question of strictness or of liberality of cunstruction arises. The Judicial Committee reiterated in the said decision at page 369 of the report that in a taxing Act provisions establishing an exception to the general rule of taxation are to be construed strictly against those who invoke its benefit. While interpreting an exemption clause, liberal interpretation should be imparted to the language thereof, provided no violence is done to the language employed. It must, however, be borne in mind that absurd results of construction should be avoided."

In Commissioner of Income Tax v. Siddaganga Oil Extractions Pvt. Ltd. ((1993) 201 ITR 968), a Division Bench of the Karnataka High Court had to deal with the following facts:

The assessee was engaged in the business of extractions of oil having two plants. The hydrogenation plant suffered loss during the relevant previous year. The solvent plant earned profit. In respect of the hydrogenation plant, the assessee sought benefit under Section 80J. This was denied, in view of the loss

sustained by the unit in question. The assessee had also claimed the benefit of Section 80 HH in respect of the solvent plant. While computing the income from this plant for the purpose of calculation of special deduction, income received by the assessee from lorry hire, weighment charges and other miscellaneous activities were sought to be added by the assessee, which again was refused by the Revenue. The Tribunal took the view that the assessee was entitled to the benefit of Section 80 HH in respect of the exclusive income yielded by the solvent plant. However, the Income Tax Officer had set off the loss of the hydrogenation plant against the profits of the solvent plant to compute the benefit of Section 80 HH in respect of the solvent plant. The Tribunal upheld the assessee's claim in this regard. Section 80HH provides for deduction of twenty per cent from the profits and accounts derived from the industrial undertaking. The Court held as follows:

"The gross total income of the assessee would include its income derived from several

sources or units. The profits and gains of one unit is only one of the constituents of the gross total income. Every item of additions and deductions to be considered at the stage of computing the taxable income to be arrived at from the gross total income need not necessarily be considered while computing the profits and gains of one unit, for purposes of Section 80HH. Under Section 80HH, the relevant question is whether there is "profits and gains" deived from an industrial undertaking which was ultimately added to the gross income of the assessee. If there is any such profits and gains, the assessee is entitled to the benefit of Section 80HH. If the loss sustained by another unit is set off against this profits and gains of an industrial undertaking, the resultant figure would not reflect the profits and gains of the said industrial undertaking in any sense, much less in a commercial sense; it will be an unnatural and artificial "profits and gains" of that industrial undertaking. In Company Electric Supply Industrial Co. Ltd. v. CIT (1978) 113 ITR 84(SC), while considering the scope of section 80E of the Act, the Supreme Court pointed out that the

difference between the "income attributable to" the business and "income derived from the business", the term "attributable to" is of wider import than the expression "derived from". In Sterling Foods v. CIT (1984) 150 ITR 292, a Bench of this Court, in the context of Section 80 HH, held that the expression "derived from" has a definite but narrow meaning and it cannot receive a flexible or wider concept."

In Commissioner of Income-Tax v. Buildwell Assam (P) Ltd. (1996) 220 ITR 577), a Division Bench of the Gauhati High Court held as follows:

"On hearing counsel for the parties and on a perusal of Section 80HH of the Income-tax Act we are of the opinion that the assessee is entitled to get rebate to the extent of any profits or gains derived from the industrial undertaking only. If the assessee carries on some other business in that case no deduction is available on such profits and gains. Accordingly, we answer the question in the negative and in favour of the Revenue and against the assessee."

6. Based on the above decisions, Shri Sarangan, learned senior counsel would contend that a beneficial interpretation is genuinely called for in the facts of this case also. Even though both the hotel units of the appellant were granted approval by the Department of Tourism in different years, Section 80 HHD does not provide for computation of relief separately for each hotel unit. On the other hand, Section 80 HHD specifically provides for computation of benefits with reference to "profits and gains of the business" which only means that the assessee's business income as a whole should be reckoned.

We, therefore, find no merit in the Appeal and the same is dismissed.

C. N. RAMACHANDRAN NAIR, JUDGE

K. M. JOSEPH, JUDGE

kbk.

C. N. RAMACHANDRAN NAIR
&

K. M. JOSEPH, JJ.

I.T.A.NO.111 OF 2001

JUDGMENT

11th April, 2007.

O.P NO. OF 200

JUDGMENT

7th March , 200